RECORD
AND
BRIEFS

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No. 16-980

IN THE

Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a non-profit advocacy organization that appears on behalf of its nationwide membership before Congress, administrative agencies, courts, and state governments on a wide range of issues. Public Citizen works for enactment and enforcement of laws to protect consumers, workers, and the public and to foster open and fair governmental processes.

The integrity of our nation's electoral system has long been one of Public Citizen's central concerns, both as an end in itself and because of its direct impact on Public Citizen's other policy concerns. As a result, Public Citizen's advocacy efforts often focus on legislation affecting the conduct of elections, and Public Citizen has frequently submitted briefs as amicus curiae to this Court in cases presenting election-law issues. *See, e.g.*, *Republican Party of La. v. FEC*, 137 S. Ct. 2178 (2017); *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015).

Public Citizen also has a longstanding interest in the principles governing interpretation of federal statutes. Application of such principles cuts across the various subject areas of Public Citizen's concern and is often central to the disposition of cases in which the organization is involved. For example, Public Citizen's attorneys were counsel in *Marx v. General Revenue Corp.*, 568 U.S. 371 (2013), which involved the application of the canon that statutes are to be construed

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of this brief. General letters of consent to the filing of amicus briefs from counsel for all parties are on file with the Clerk.

to avoid superfluity—a canon invoked, wrongly, in the Brief of the United States supporting petitioners in this case. Public Citizen believes that a short discussion of the flaws in the United States' application of the interpretive methods it invokes to justify its change of position in this case may be of assistance to the Court as it considers the important question presented.

INTRODUCTION AND SUMMARY OF ARGUMENT

The National Voter Registration Act of 1993 (NVRA) provides that no state may engage in any program or activity that will "result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2). This prohibition is subject to a single exception: "[N]othing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters" when specified conditions are met. *Id.* Subsections (c) and (d), in turn, provide procedures by which states may confirm information that a registered voter has changed residence to a place outside the jurisdiction in which he or she is registered. Under those procedures, a voter's failure to respond to a notice seeking confirmation of his or her change of address and to vote during the period ending with the second general election after the date of the notice permits removal from the voter rolls.

This case involves Ohio's use of a notice-and-failure-to-respond-or-vote procedure to purge its voter registration lists in the absence of any information

that voters have changed residence. Rather, under Ohio's "supplemental" process for deregistering voters, voters are targeted to receive notices initiating the process solely because of their failure to vote in prior elections. As explained by respondents—organizations and an individual voter who challenge Ohio's actions—the use of failure to vote as a trigger for sending notice and deregistering voters violates the NVRA's prohibition on activities that result in removal of voters for failure to vote. Ohio's method falls outside the NVRA exception because it is not a use of the "procedures described" in subsections (c) and (d) of § 20507 to confirm information that a voter has changed residences.

Although respondents' position coincides with the longstanding view of the United States Department of Justice, the United States has reversed its view since the court of appeals' decision in this case, and now asserts that the Ohio procedure comports with the statute. The newly minted position of the United States rests in significant part on its argument that respondents' reading of the law renders superfluous the exception language in § 20507(b)(2), which was added as a clarification when Congress enacted the Help America Vote Act (HAVA) in 2002. *See* U.S. Br. 23. At the same time, however, the government acknowledges that its new view renders other language of HAVA superfluous. U.S. Br. 26.

The government then invites the Court to apply the canon against superfluity to choose between two competing interpretations that, it says, both fail to account for all of the statutory language. According to the government, the Court should select the reading that avoids what it calls "the more glaring superfluity." U.S. Br. 26 n.8. Its interpretive methods cannot

be squared with this Court's decisions, which have recognized that the canon against superfluity applies only when the litigant who relies on it is able to proffer a construction that gives effect to all the language of a statute—a test the government concedes it cannot meet. *See id.*

The flaws in the government's invocation of the canon do not stop there. The respondents' position does not in fact render any part of § 20507 superfluous. The government's, on the other hand, ignores the plain meaning of express language in each of the relevant subsections of § 20507, fails to address key language in HAVA that expressly negates the government's argument that it narrows or limits the prohibitions of the NVRA, and disregards the interpretive principle that exceptions to remedial statutes should be narrowly construed.

In short, the United States' construction of the statute is untenable.

ARGUMENT

I. The United States' invocation of the canon against surplusage is contrary to fundamental limitations on that doctrine.

The United States' new reading of the NVRA hinges largely on the proposition that, when HAVA added the exception language to § 20507(b)(2), Congress must have "intend[ed] its amendment to have real and substantive effect." U.S. Br. 23 (quoting *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1586 (2016)). The "real and substantive effect" the government posits is to permit deregistration of voters for failing to vote as well as for changes of residence, as

long as the state employs a notice-and-failure-to-respond-or-vote method to do so. Not reading the exception language in this way, the government argues, creates "glaring superfluity by denying any effect to the provision of HAVA amending Section 20507(b)(2)." *Id.* at 26 n.8.

The government, however, elsewhere seems to acknowledge that its own interpretation renders other language in HAVA superfluous. There, in contrast to its earlier assertion that the language it favors must be given real and substantive effect to avoid superfluity, it pivots to relying on the proposition that "[t]his Court's 'preference for avoiding surplusage constructions is not absolute'" and does not prevail over other expressions of plain congressional intent. *Id.* at 26 (quoting *Lamie v. United States Trustee*, 540 U.S. 526, 536 (2004)). In addition, the government points to its claim of superfluity in § 20507(b)(2) as a reason for disregarding the superfluity problem created by its own position, and it observes that "the canon against superfluity assists only where a competing interpretation gives effect 'to every clause and word of a statute.'" *Id.* at 26 n.8 (quoting *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011) (citation omitted)).

The government's quotations are accurate, but also devastating to its position. The problem is not just the government's opportunistic approach of invoking the canon when it appears favorable to the government's new reading of the statute and denigrating it when it cuts against the government's argument. The more fundamental difficulty is that the government's invitation to choose what it considers the less "glaring" superfluity runs counter to the Court's recent reminders that the canon against construing statutes to

avoid rendering words and phrases superfluous does not work that way.

Rather, the Court has emphasized that because statutory drafting not infrequently involves some redundancy and surplusage, *see, e.g.*, *Arlington Cent. School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 299 n.1 (2006); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992), the canon against superfluity "is not an absolute rule," *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013). Thus, the Court has repeatedly held that "the canon against surplusage 'assists *only* where a competing interpretation gives effect to every clause and word of a statute.'" *Id.* (quoting *Microsoft v. i4i*, 564 U.S. at 106) (emphasis added); *see also Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 236 & n.48 (2011); *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *United States v. Menasche*, 348 U.S. 528, 538–39 (1955). The canon does not strongly favor one interpretation over another where "no interpretation ... gives effect to every word," *Marx*, 568 U.S. at 385, or where a proffered statutory construction gives meaning to one passage "only at the expense of rendering the remainder ... superfluous." *Bruesewitz*, 562 U.S. at 236.

Even by the government's own account, its reading does not give effect to every word of the interlocking provisions at issue. Its reliance on the canon of avoiding surplusage is therefore unavailing.

II. The United States' new reading of the NVRA is not needed to avoid rendering § 20507(b)(2)'s exception superfluous.

The errors in the government's construction of the NVRA run deeper than the flaw in its understanding of the canon against superfluity. The government's assertion that the respondents' construction fails to give

meaning to the exception language in § 20507(b)(2) is itself fundamentally wrong—indeed, incoherent. Moreover, that position fails to account for critical language in § 20507(b)(2), in § 20507(d), and in HAVA, and thus violates the United States' own caution against reliance on canons of construction that require "departing from the 'plain meaning' of the statutory text." U.S. Br. 26 (citing *Lamie*, 540 U.S. at 536).

A. Respondents' reading of the statute gives full effect to all its provisions.

The assertion that respondents' reading of the statute fails to give effect to the exception language in § 20507(b)(2) is hard to credit. The respondents *acknowledge* that the statutory prohibition on state registration maintenance programs that result in de-registration based on a voter's failure to vote does not apply when a state carries out a program that uses the procedures described in subsections (c) and (d) of § 20507 to remove registrants who have "changed residence," 52 U.S.C. § 20507(d). *See* Resp. Br. 36. But a process, like Ohio's, that removes voters, not because there is reason to believe that they have *moved*, but because they have *not voted*, is not a use of "the procedures described in subsections (c) and (d)." The process thus does not fit within the exception language in § 20507(b)(2).

The procedures described in subsection (c) involve the use of change-of-address information from the Postal Service, and Ohio's supplemental process indisputably does not involve the use of such procedures. Subsection (d) likewise authorizes only procedures to remove a registrant "on the ground that the registrant has changed residence," 52 U.S.C. § 20507(d)(1), and provides for notices aimed at "confirm[ing]" whether

the voter's residence has changed. *Id.* §§ 20507(d)(1)(A), (d)(2)(A). A process that is not based on, and does not attempt to confirm, any information as to a voter's change of residence, is not a procedure described in subsection (d).

As this Court has explained, "the canon against surplusage" that the United States invokes here "is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Marx*, 568 U.S. at 386. But interpreting § 20507(b)(2) to allow the use of the procedures of subsections (c) and (d) to remove voters who have changed residence, but not to allow a notice-and-failure-to-respond-or-vote method of removal that is not tied to a change of residence, gives meaningful effect to each part of the statute: the underlying prohibition on removal for failure to vote, the (b)(2) exception language, and all the language of subsections (c) and (d) that describe the procedures and thus define the scope of the exception. Nothing in the respondents' position renders any part of the statutory scheme superfluous.

B. The United States' assertion that its reading of the NVRA is necessary to give "real and substantive effect" to the (b)(2) exception language is incoherent.

The United States' contrary argument rests significantly on the point that the exception language was added in HAVA nine years after the original enactment of the NVRA. Because removal of registrants in compliance with the subsection (c) and (d) procedures already was permissible under § 20507, the government asserts that the exception language must have "a real and substantive effect" beyond authorizing the use of those procedures to confirm information that

voters have changed residence. *See* U.S. Br. 22–23 (quoting *Husky*, 136 S. Ct. at 1586). Simultaneously, however, the government acknowledges that the language was a "clarifying amendment," *id.* at 19; *see id.* at 23 n.6, and it asserts that the amendment "did not alter the meaning of Section 20507(b)(2)." *Id.* Thus, the government's argument boils down to the paradoxical assertion that the amendment had the "real and substantive effect" of "not alter[ing] the meaning" of the statute.

The government argues that this non-effect was nonetheless "real and substantive" because it "settled a recognized dispute" over whether section 20507(b)(2) prohibits a program like Ohio's under which the removal process is initiated based on failure to vote rather than information indicating that a voter has changed residence. U.S. Br. 23. Even assuming that such a "recognized dispute" existed (*but see* Resp. Br. 50–51), the government's argument begs the question *how* the language settled it. The answer is that, by stating that the exception for a notice-and-failure-to-respond-or-vote method of removal applies only when it is conducted in compliance with the procedures described in subsections (c) and (d), the exception language in fact clarified that programs such as Ohio's are not permissible because they do not use the procedures described in those subsections.

The incoherence of the government's position is heightened by its failure to account for the framing of the language added to § 20507(b)(2) as an *exception* to the otherwise applicable prohibition on state activities that result in deregistration for failure to vote. The United States argues that the use of a notice-and-failure-to-respond-or-vote removal method does not un-

der any circumstances "result in the removal" of a registrant "by reason of the person's failure to vote" within the meaning of § 20507(b)(2). *See* U.S. Br. 15–19. In other words, the government's reading of the statute is that programs like Ohio's would not be prohibited under subsection (b)(2) even *without* the addition of the exception language, and, indeed, even if subsections (c) and (d) did not exist.

Thus, on the government's own reading of the statute, the clarification provided by the exception language was wholly unnecessary and lacked the "real and substantive effect" the government insists it must be given. Even worse for the United States' position, its new reading of the statute cannot explain why Congress would clarify that the permission to use the procedures described in subsections (c) and (d) is an *exception* to the otherwise applicable prohibition on removing registrants for failure to vote. In the government's view, the subsection (c) and (d) procedures are not exceptions to the (b)(2) prohibition because it would not apply to them in any event. Far from giving meaning to the language added by HAVA, the government's view of the statute renders it unnecessary, even nonsensical.

Respondents' position, on the other hand, sensibly accounts for the clarification that the exception language provides: Subsections (c) and (d) create an exception because, but for those provisions, programs that use nonvoting following a notice as a basis for removal as described in subsections (c) and (d) would violate subsection (b)(2)'s prohibition on deregistration for failure to vote. And the exception allowing the use of such methods applies only when they are carried out using the procedures described in subsections (c) and (d).

C. The United States' new reading of the statute ignores HAVA's plain language.

The government's insistence on reading language added by HAVA to support a substantive limit on the application of the subsection (b)(2) prohibition on de-registration because of nonvoting is contrary to the plain language of HAVA—language that the United States does not even mention in its brief. HAVA expressly provides that, with one exception not applicable here (concerning the requirement that certain registrants provide identification the first time they vote), "nothing" in HAVA "may be construed to ... supersede, restrict, or limit the application of [the NVRA]." 52 U.S.C. § 21145(a).

The government makes no attempt to demonstrate that its construction of the exception language added by HAVA complies with the prohibition on reading HAVA to "limit the application" of the NVRA—including, of course, the application of subsection (b)(2).[2] Moreover, the government's admonition that the Court should "presume" that the amendment nonetheless was intended to have such effect overlooks that the presumption that an amendment has "real and substantive effect" is only that: a presumption. *See Husky*, 136 S. Ct. at 1586. When a statute unambiguously disclaims a particular effect, any otherwise applicable presumption that it has that effect cannot control the statute's construction.

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[2] The plain language of HAVA also rules out any suggestion that 52 U.S.C. § 21083(a)(4)(A) limits the prohibition of § 20507(b)(2). To its credit, the government itself appears to acknowledge this point when it describes § 21083(a)(4)(A) as merely "an imprecise reference to the requirements set forth in more detail in Section 20507." U.S. Br. 26.

D. Other principles of statutory interpretation weigh against the United States' new reading of the NVRA.

The United States' new position also overlooks canons of construction that point toward a reading more consistent with both the statutory language and the purposes evident from that language. In particular, the government does not recognize that the permission to engage in the procedures described in subsections (c) and (d) is an exception to the broad and otherwise applicable remedial requirement that states not deregister voters for failure to vote. As this Court has long recognized:

> Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.

A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945). Given the statute's general policy against deregistration for non-voting, the exception to that policy must be "read ... narrowly in order to preserve the operation of the [policy]." *Commissioner v. Clark*, 489 U.S. 726, 739–40 (1989); *accord, e.g., John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 97 (1993).

Ultimately, this Court's interpretive task is to "do [its] best, bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their

place in the overall statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015) (citation omitted). Respondents' construction of the NVRA gives effect to all of its provisions, including language that the United States' new reading cannot explain. And it gives effect to the statute's evident purposes, without ascribing a significance to the subsequent enactment of HAVA that Congress explicitly disclaimed. By contrast, the government's shifting and self-contradictory reliance on the canon of avoiding superfluity, in the circumstances here, "does not seem a particularly useful guide to a fair construction of the statute." *Id.*

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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